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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

ALFONSO DIUGUID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER.

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STATEMENT.

The petitioner herein has been granted leave to file this reply brief by May 4, 1945.

ARGUMENT.

A.

It is apparent from the tenor of the government's brief and its statement of the "question presented" that the government relies upon an erroneous interpretation of the evidence. The government's argument becomes invalid upon a realization that it is based entirely upon the false premise that it was the police officer who seized the evidence and arrested the defendant.

The facts, however, are that the federal agent, without permission and without a warrant of search and seizure or arrest, entered the apartment of the petitioner and seized the evidence and arrested the petitioner therein.

At page "4" of its brief, the government alleges that Police Officer Kaye arrested the petitioner and seized the still and refers the Court to R. 10, 11 and 18. The references do not sustain the government's allegations of fact.

At page "10" of the record, there is not a single statement concerning an arrest or seizure.

At page "11" of the record, there is no evidence that Police Officer Kaye arrested the petitioner and seized the still. The only statement concerning a seizure may be found in a question asked of Kaye by government counsel as follows:

> "Q. How did the Federal men get there? A. They got there approximately an hour and a half later.
> Q. And what did you do? A. I phoned.
> Q. After you made the seizure? A. That's right."

The question "After you made the seizure?" was highly improper, since it assumed a fact not in evidence. A statement of an alleged fact incorporated in a question is not proof.

The record however, is replete with evidence that it was the federal agent who arrested the petitioner and seized the still.

At page "14" of the record, Police Officer Kaye in answer to questions propounded by the Court admitted that the federal agents took over the still:

> "The Court: Objection sustained. (To witness): Did the federal agents come later on, to the house?
> The Witness: Yes.
> The Court: And take over the still?
> The Witness: Yes."

At page "18" of the record, Federal Agent Adler admitted that he took over the still and arrested the petitioner, in answer to questions propounded by the Court:

> "Q. You took over the still then, is that right? A. Yes.
>
> Q. And you put this defendant under arrest? A. That's right."

Conceding that the police officer was first on the scene and forcibly entered the petitioner's apartment, the facts show that he never made a legal seizure or arrest. The police officer neither removed the subject of the seizure from the apartment nor made a formal arrest. Section 165 of the Code of Criminal Procedure of the State of New York, specifically provides that a defendant, upon his arrest, must in all cases be taken before a Magistrate without unnecessary delay. That was not done. The fact that the police officer neither took the petitioner to a police station nor arraigned him before a Magistrate is strong, perhaps conclusive, evidence that he never made an arrest.

B.

The government's brief studiously avoids the main issue to wit: did the federal agent violate the petitioner's constitutional rights when he entered the apartment of the petitioner without permission and without a warrant of search and seizure or arrest, and seize the evidence and arrest the petitioner. The government in its brief at page "8" footnote "5" makes the bald statement that there is no basis for petitioner's argument, that the federal agent entered his apartment illegally. That is the very questions which this Court must decide. The government neither cites any authority nor refers to any portion of the record to justify its allegation.

C.

The government's brief at page "8" footnote "4" concedes that error was committed by the Trial Court in refusing to permit petitioner's counsel on cross-examination of Police Officer Kaye to inquire whether earlier seizures were made without warrants. The Court also refused to permit defense counsel to cross-examine the police officer to elicit whether he had been on other raids with the federal agent. The only practical method an accused has to prove concert of action between the federal agent and police officer is by circumstantial evidence. An accused must be permitted wide latitude upon cross-examination to develop facts of previous raids and agreements between the federal agent and police officer from which the Court and jury could logically infer that the same methods were used in the case at bar. The Court's refusal to permit such inquiry constituted serious reversible error.

D.

At footnote "4", page "8" of its brief, the government indulges in pure speculation when it states that "for all that appears he may have looked up Sparago's home telephone number in the directory". There is nothing in the record to justify the government's allegation. If the Court desires to indulge in speculation it could reasonably believe that there was an agreement between the federal agent, Sparago and the police officer, that Sparago be called the moment the police officer illegally entered the home of the petitioner and found any evidence of crime and for that purpose Sparago gave the police officer his home telephone number.

E.

In further support the petitioner's argument set forth at page "7" of his main brief, counsel directs the Court's attention to two additional cases, *Dennert* v. *United States*,

147 Fed. Reporter 2nd 286, C. C. A. Sixth Circuit; and *Amos* v. *United States*, 255 U. S. 313.

In the *Dennert* case, a United States revenue agent broke into Dennert's house without a search warrant. Among other things, the agent sought to justify the search by asserting that the search had been consented to by a tenant in another portion of the premises who had neither control nor dominion over the locked rooms which had been broken into. The Court held the search invalid, and in violation of the defendant's rights. The Court there incidentally held that there was ample opportunity to obtain a search warrant.

In the *Amos* case the government sought to justify a search without a warrant on the ground that the wife of the accused permitted the federal agents access to the premises. The Court held the search invalid, stating in part as follows at page 317:

> "We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected."

Nor was any such waiver effected in the case at bar by the police officer who was forcibly in possession of the petitioner's home. If as in the *Dennert* case, a tenant who had no control or dominion over the premises searched cannot waive an accused's constitutional rights, or if, as in the *Amos* case, the coercion of a wife could not constitute a waiver of her husband's rights, it must necessarily be held that Police Officer Kaye, a trespasser, who had no right to be on the premises, had no authority or power to waive the constitutional rights of the petitioner and permit a federal agent to enter, seize evidence and make an arrest. As a consequence, the federal agent, acting without lawful authority, became as responsible for his illegal acts as if he himself had initiated the search, thus invalidating the seizure and arrest.

CONCLUSION.

For the reasons stated in the petition, the original brief and in this reply brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

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